



Signed and Filed: April 1, 2016

A handwritten signature in black ink, appearing to read "Hannah L. Blumenstiel".

HANNAH L. BLUMENSTIEL  
U.S. Bankruptcy Judge  
UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re: ) Case No. 13-30827 HLB  
)  
DAVID WILLIAM BARTENWERFER and ) Chapter 7  
KATE MARIE BARTENWERFER, )  
)  
Debtors. )  
)  
KIERAN BUCKLEY, ) Adv. Proc. No. 13-03185 HLB  
)  
Plaintiff, )  
)  
v. )  
)  
DAVID WILLIAM BARTENWERFER and )  
KATE MARIE BARTENWERFER, )  
)  
Defendants. )

**MEMORANDUM DECISION**

**I. INTRODUCTION**

This matter came on for trial on January 19 and 22, 2016 on Plaintiff Kieran Buckley's complaint to determine the dischargeability of debt pursuant to 11 U.S.C. § 523(a)(2)(A).<sup>1</sup> The sole issue at trial was whether Defendants David and Kate Bartenwerfer fraudulently omitted disclosing material defects

<sup>1</sup> Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, §§ 101-1532, or to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 plaguing real property sold by the Bartenwerfers to Mr.  
2 Buckley.

3 Janet Brayer and Stephen Finestone appeared for Mr.  
4 Buckley. Iain MacDonald and Matthew Olson appeared for the  
5 Bartenwerfers. After the parties rested, the Court took the  
6 matter under advisement.

7 This memorandum decision constitutes the Court's findings  
8 of fact and conclusions of law as required by Rule 52(a) of the  
9 Federal Rules of Civil Procedure, as made applicable to this  
10 adversary proceeding by Rule 7052 of the Federal Rules of  
11 Bankruptcy Procedure. This court has jurisdiction over this  
12 action under 28 U.S.C. § 1334(b). The parties have consented  
13 to entry of final judgment by this Court in this action, which  
14 is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).  
15 Venue of this lawsuit is proper pursuant to 28 U.S.C. § 1409.

16 For the reasons that follow, the Court finds that the  
17 Bartenwerfers fraudulently omitted disclosing material defects  
18 on the subject property and that their related debt to Mr.  
19 Buckley is non-dischargeable pursuant to section 523(a)(2)(A).

## 20 **II. BACKGROUND**

21 Mr. Bartenwerfer received an MBA from Stanford in 1995.  
22 He has no education or training in construction and does not  
23 hold a contractor's license. Mrs. Bartenwerfer has worked at  
24 McKesson for 10 years and is currently employed as a Manager.  
25 She also holds a California real estate agent's license.

1 Schedule I.<sup>2</sup> The Bartenwerfers operate two businesses: RJUOP  
2 I, LLC, a property development business, and Parthenon Design.  
3 Statement of Financial Affairs no. 18.

4 The Bartenwerfers bought and extensively remodeled a home  
5 located at 549 28th Street, San Francisco, California (the  
6 "Property"), which they subsequently sold to Mr. Buckley. The  
7 Bartenwerfers signed disclosure statements regarding the  
8 condition of the Property on November 11, 2007. They signed  
9 the sales contract on January 24, 2008. Escrow closed on March  
10 14, 2008. Post-sale, Mr. Buckley discovered undisclosed  
11 defects and ultimately sued the Bartenwerfers in San Francisco  
12 County Superior Court to recoup damages under a number of  
13 theories. After a 19-day trial, a jury entered a special  
14 verdict. As relevant to this proceeding, the jury found in  
15 favor of Mr. Buckley on his claim for Non-Disclosure of  
16 Material Facts as follows:

17 (1) The Bartenwerfers failed to disclose information that  
18 they knew or should have known about water leaks,  
19 window conditions, permits, and the fire escape.

20 (2) Mr. Buckley did not know and could not have  
21 reasonably discovered this information.

22 (3) The Bartenwerfers knew or reasonably should have  
23 known that Mr. Buckley did not know and could not  
24 have reasonably discovered the information.

25  
26  
27 \_\_\_\_\_  
28 <sup>2</sup> The Court takes judicial notice of the documents filed in the underlying  
bankruptcy case (case no. 13-30827). Fed. R. Evid. 201 made applicable to  
bankruptcy proceedings pursuant to Fed. R. Bankr. Proc. 9017.

1 (4) This information significantly affected the value or  
2 desirability of the property.

3 (5) Mr. Buckley was harmed.

4 (6) The Bartenwerfers' failure to disclose the  
5 information was a substantial factor in causing Mr.  
6 Buckley's harm.

7 The state court entered a judgment against the  
8 Bartenwerfers in the amount of \$444,671. After post-trial  
9 briefing, Mr. Buckley accepted a \$210,000 reduction in the  
10 amount of the judgment, which was amended to award \$234,671.

11 Mr. Buckley requests a finding of non-dischargeability  
12 under section 523(a)(2)(A) as to the damages awarded by the  
13 state court for non-disclosure of issues relating to water  
14 leaks (\$48,981), window conditions (\$20,000), status of permits  
15 (\$14,888), and the fire escape (\$5,076); the value/cost  
16 differential (\$90,000); and costs of suit (\$40,019.89) for a  
17 total non-dischargeable debt in the amount of \$218,964.89.

18 The Bartenwerfers do not dispute the amount of damages,  
19 but assert that they did not possess the fraudulent intent  
20 necessary to except the judgment from discharge under section  
21 523(a)(2)(A).<sup>3</sup>

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22  
23 <sup>3</sup> The Defendants also argued in their trial brief that Mr. Bartenwerfer's  
24 alleged fraudulent conduct could not be imputed to Mrs. Bartenwerfer based on  
25 their marital relationship. At trial, after Mr. Buckley rested his case-in-  
26 chief, the Bartenwerfers moved for a directed verdict pursuant to Federal Rule  
27 of Civil Procedure 52(c), applicable in this proceeding via Rule 7052, as to  
28 Mrs. Bartenwerfer, on the grounds that Mr. Buckley failed to prove by a  
preponderance of the evidence that she had the requisite knowledge of the  
misrepresentations and omissions or intent to defraud, and that a marital  
relationship is insufficient to impute the fraud of one spouse to the other.  
The Court denied the motion for a directed verdict, finding that an agency  
relationship existed between Mr. and Mrs. Bartenwerfer based on their  
partnership with respect to the remodel project: she was on title to the

1       **III. LEGAL STANDARDS**

2       **A. Exception to Discharge under section 523(a)(2)**

3           Section 523(a)(2)(A) provides: (a) A discharge under . .  
4 . this title does not discharge an individual debtor from any  
5 debt— . . . (2) for money, property, services, or an extension,  
6 renewal, or refinancing of credit, to the extent obtained by –  
7 (A) false pretenses, a false representation, or actual fraud,  
8 other than a statement respecting the debtor's or an insider's  
9 financial condition. 11 U.S.C. § 523(a)(2)(A).

10          To prevail in a section 523(a)(2)(A) action, a creditor  
11 must prove five elements by preponderance of the evidence: (1)  
12 a misrepresentation, fraudulent omission or deceptive conduct  
13 by the debtor; (2) knowledge of the falsity or deceptiveness of  
14 his statement or conduct; (3) the debtor made the  
15 representation with the intention and purpose of deceiving the  
16 creditor; (4) the creditor justifiably relied on the  
17 representation; and (5) the creditor sustained damage as the  
18 proximate result of the representation. Turtle Rock Meadows  
19 Homeowners Ass'n. v. Slyman (In re Slyman), 234 F.3d 1081 1085  
20 (9th Cir. 2000).

21       **B. Collateral Estoppel**

22          Principles of collateral estoppel apply to proceedings  
23 seeking exceptions from discharge pursuant to 11 U.S.C. §  
24 523(a). Grogan v. Garner, 498 U.S. 279, 284 n. 11 (1991).  
25 Under the Full Faith and Credit Act, 28 U.S.C. § 1738, the  
26

27 \_\_\_\_\_  
28 Property, signed the disclosure statements relating to the Property, and would  
financially benefit from the successful completion of the project and sale of  
the Property.

1 preclusive effect of a state court judgment in a subsequent  
2 bankruptcy proceeding is determined by the preclusion law of  
3 the state in which the judgment was issued. Harmon v. Kobrin  
4 (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001) (citations  
5 omitted). Thus, California law governs the preclusive effect  
6 of Mr. Buckley's judgment.

7 Under California law, collateral estoppel may only be  
8 applied if five threshold requirements are met and if its  
9 application furthers the public policies underlying the  
10 doctrine. Id. The policies the Court must consider are  
11 preservation of the integrity of the judicial system, promotion  
12 of judicial economy, and protection of litigants from  
13 harassment by vexatious litigation. Lucido v. Superior Court,  
14 51 Cal. 3d 335, 343, 795 P.2d 1223, 1227 (1990).

15 The five threshold requirements are: (1) the issue to be  
16 precluded from relitigation must be identical to that decided  
17 in a former proceeding; (2) the issue must have been actually  
18 litigated in the former proceeding; (3) the issue must have  
19 been necessarily decided in the former proceeding; (4) the  
20 decision in the former proceeding must have been final and on  
21 the merits; and (5) the party against whom preclusion is sought  
22 must be the same as, or in privity with, the party to the  
23 former proceeding. Id. The party asserting collateral  
24 estoppel bears the burden of establishing these requirements.  
25 Id.

1       **IV. DISCUSSION**

2           **A. Collateral Estoppel Applies to the Jury Verdict**

3       The state court jury verdict on Mr. Buckley's cause of  
4 action for Seller Non-Disclosure of Material Facts found that  
5 the Bartenwerfers failed to disclose material information that  
6 they knew or should have known (misrepresentation); that Mr.  
7 Buckley did not know nor could have known about the omitted  
8 information (justifiable reliance); and that the omission of  
9 material information was a substantial factor contributing to  
10 Mr. Buckley's harm (proximate cause and damages). Thus, these  
11 issues, which are identical to most of the elements Mr. Buckley  
12 would need to prove in order to prevail on his section  
13 523(a)(2)(A) claim, were actually and necessarily litigated in  
14 the state court action, which involved the same parties. No  
15 one disputes that the amended judgment is final.

16       But beyond this, the Court finds that the principles  
17 underlying the doctrine of collateral estoppel are furthered by  
18 its application here as to these findings which satisfy  
19 elements (1), (4), and (5) of a 523(a) action, as enumerated  
20 above. The issues have already been decided so it would not be  
21 judicially economical to retry them. Furthermore, retrying the  
22 issues in this Court could result in a different outcome, which  
23 would negatively impact the integrity of the judicial system.

24       As the Court previously found in the context of  
25 Plaintiff's motion for summary judgment, the remaining  
26 elements; i.e., knowledge of the falsity of the statement and  
27 intent to deceive the creditor, were not actually litigated or  
28 decided and were subject to a trial on the merits.

1           **B. Knowledge and Intent**

2           The scienter requirement for a fraudulent  
3 misrepresentation is established by showing either actual  
4 knowledge of the falsity of a statement, or reckless disregard  
5 for its truth. Gertsch v. Johnson & Johnson, Fin. Corp. (In re  
6 Gertsch), 237 B.R. 160, 167 (B.A.P. 9th Cir. 1999). Intent to  
7 deceive or reckless disregard for truth can be inferred from  
8 the totality of the circumstances. Id. at 167-68. "A  
9 representation may be fraudulent, without knowledge of its  
10 falsity, if the person making it 'is conscious that he has  
11 merely a belief in its existence and recognizes that there is a  
12 chance, more or less great, that the fact may not be as it is  
13 represented.'" Id. at 168 (quoting Restatement (Second) of  
14 Torts § 526, cmt. E (1977)).

15           An omission gives rise to liability for fraud only when  
16 there is a duty to disclose. Citibank, N.A. v. Eashai (In re  
17 Eashai), 87 F.3d 1082, 1089 (9th Cir. 1996). "[A] party to a  
18 business transaction has a duty to disclose when the other  
19 party is ignorant of material facts which he does not have an  
20 opportunity to discover." Apte v. Japra M.D., F.A.C.C., Inc.  
21 (In re Apte), 96 F.3d 1319, 1324 (9th Cir. 1996).

22           In addition, California law requires a seller of real  
23 property to make certain disclosures of which the seller has  
24 knowledge at the time of the disclosure. Cal. Civ. Code §§  
25 1102 et seq. These disclosures must be made in good faith,  
26 which requires honesty in fact in conducting the transaction.  
27 Cal. Civ. Code § 1102.7.  
28

1 At trial, Mr. Bartenwerfer admitted that he understood  
2 that the disclosures he made pursuant to California Civil Code  
3 section 1102 constituted his representations as to the  
4 condition of the Property. These representations belong to  
5 Mrs. Bartenwerfer, too, given that she signed them. The  
6 substance of these representations and the extent to which they  
7 did not accurately or completely disclose the Property's  
8 condition, merit further discussion.

9 On November 11, 2007, the Bartenwerfers signed a Real  
10 Estate Transfer Disclosure Statement (the "Disclosure  
11 Statement") certifying that the information therein was true  
12 and correct to the best of their knowledge as of that date.  
13 Plaintiff's Ex. 2 at 3.<sup>4</sup> The Bartenwerfers also signed a  
14 Seller's Supplemental to the Real Estate Transfer Disclosure  
15 Statement (the "Supplemental Disclosure" and, together with the  
16 Disclosure Statement, the "Disclosures") on November 11, 2007,  
17 stating that they answered the questions therein in "in an  
18 effort to fully disclose all material facts relating to the  
19 Property and hereby certify that the information provided is  
20 true and correct to the best of my knowledge." Id. at 7.

21 On January 24, 2008, the Bartenwerfers signed a Contract  
22 for the Sale and Purchase of Real Property (the "Contract"),  
23 representing that "Seller has no knowledge or notice that the  
24 Property has any material defects other than as disclosed by  
25 the Seller in the [Disclosure Statement] or other writing  
26

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27 <sup>4</sup> Mrs. Bartenwerfer is identified as "Kate Pfenninger," which the Court  
28 believes to be her maiden name.

1 before Acceptance or a soon thereafter as practicable."  
2 Plaintiff's Ex. 1 at 6, ¶ 19. The Bartenwerfers made no  
3 additional written disclosures beyond what was contained in the  
4 Disclosures and Contract. Mr. Bartenwerfer admitted that he  
5 understood that he had an ongoing duty to disclose to Mr.  
6 Buckley any material defects; i.e., anything a buyer would want  
7 to know before purchasing the Property.

8 1. Mr. Bartenwerfer's Credibility

9 At trial, in an apparent effort to try to protect Mrs.  
10 Bartenwerfer from having any findings of fraudulent intent  
11 imputed to her, Mr. Bartenwerfer testified that he did not  
12 prepare the Disclosure Statement on behalf of Mrs.  
13 Bartenwerfer. This testimony contradicted his testimony during  
14 the state court trial that he had prepared the Disclosure  
15 Statement on behalf of his wife. Reporter's Transcript of  
16 Trial Proceedings David Bartenwerfer's Testimony, September 5,  
17 2012 at 94.

18 In addition, when asked whether Mrs. Bartenwerfer  
19 authorized him to complete the Supplemental Disclosure on her  
20 behalf, Mr. Bartenwerfer avoided answering the question  
21 directly, stating that she sat at the kitchen table while he  
22 filled it out but did not herself have the necessary  
23 information. This testimony was inconsistent with his  
24 testimony during the state court trial which explicitly  
25 acknowledged that Mrs. Bartenwerfer authorized him to complete  
26 the Supplemental Disclosure on her behalf. Id. at 111-12.

27 The Court finds that these inconsistent statements, as  
28 well as others made during trial, as noted below, significantly

1 and negatively affect the credibility of Mr. Bartenwerfer's  
2 testimony

3       2.   Water Leaks

4       The Bartenwerfers answered "No" to the question on the  
5 Supplemental Disclosure that asked: "Are there any past or  
6 present leaks or water intrusion from or through the roof,  
7 skylights, windows, siding, basement, foundation, or any other  
8 source? (please itemize even if leaks have been stopped)." Id.  
9 at 6.

10       At trial, Mr. Bartenwerfer admitted that he paid Freutel  
11 Roofing Inc. to repair leaks, specifically a leak above the  
12 master bedroom closet near the deck. Freutel Roofing submitted  
13 a quote for \$1,600 to do work including patching the membrane  
14 at the deck area, adding material to the upper roof to get  
15 better drainage, and replace and seal base at same area of  
16 roof. The quote is dated October 17, 2007, less than a month  
17 before the Bartenwerfers signed the Supplemental Disclosure, in  
18 which they represented that there were no past or present  
19 leaks. In 2008-2009, Mr. Buckley discovered a leak in the  
20 master bedroom ceiling, below the deck, as well as other leaks,  
21 including one in the media room.

22       Mr. Bartenwerfer admitted that he did not amend the  
23 Disclosures to disclose the leak and testified that he did not  
24 believe he had to disclose the leak because it occurred during  
25 the construction process and was corrected before the  
26 construction was complete. Mr. Bartenwerfer admitted that he  
27 did not disclose the leak to his realtor, Peter Monti, because  
28 it "didn't feel like a big deal." Mr. Bartenwerfer denies any

1 intent to deceive and asserts that he made a simple mistake.  
2 The Court does not find Mr. Bartenwerfer's testimony credible,  
3 especially in light of the fact that the leak was repaired so  
4 close in time to the Supplemental Disclosures and at the very  
5 end of the construction on the Property. Considering the  
6 totality of the circumstances, including those relating to the  
7 other non-disclosures, the Court finds and concludes that the  
8 Bartenwerfers had the requisite knowledge and intent to deceive  
9 Mr. Buckley with respect to non-disclosure of the leak.

10       3.   Permits

11       On the Supplemental Disclosure, the Bartenwerfers indicated  
12 that every time a permit for work on the Property was applied  
13 for, it was issued, but that an inspector did not approve the  
14 work by signing off on each permit after the relevant  
15 construction work was completed. Plaintiff's Ex. 2 at 6. The  
16 Bartenwerfers provided an explanation, stating that they let the  
17 "permit to update original kitchen [to] expire because of  
18 floorplan change, new kitchen completed with permits." Id. The  
19 Bartenwerfers did not disclose any additional open permits.

20       At trial, Mr. Bartenwerfer admitted that at the time he  
21 signed the Disclosures he was aware that electrical and plumbing  
22 work had not been approved by an inspector, that the permits had  
23 not received final sign off, and that a lack of final sign off on  
24 electrical and plumbing permits is something a buyer would want  
25 to know. Mr. Bartenwerfer admitted that as of November 11, 2007  
26 - the date the Bartenwerfers signed the Disclosures - there were  
27 ten permits which had not been signed off as complete. Mr.  
28 Bartenwerfer asserted that he did not disclose the open permits

1 because he thought they were "basically done" and would be signed  
2 off at any time. But, Mr. Bartenwerfer also admitted that he was  
3 aware that the plumbing and electrical permits had not been  
4 signed off as final as of January 22, 2008, the date of Mr.  
5 Buckley's offer to buy the Property. Though more than two months  
6 had passed since they signed the Disclosures, the Bartenwerfers  
7 still did not disclose the open permits to Mr. Buckley.

8 Mr. Bartenwerfer admitted at trial that he received a  
9 Notice of Violation, dated January 31, 2008, which stated in  
10 relevant part that all permits had expired and no special  
11 inspection reports had been submitted (18 reports were  
12 required). He also admitted that he did not disclose the  
13 Notice of Violation or the expired permits to Mr. Buckley or  
14 Mr. Monti, and that he did not provide all permits to Mr.  
15 Buckley until after close of escrow. Mr. Monti testified that  
16 he had never seen the Notice of Violation and that such a  
17 notice would require the Disclosures to be amended. In his  
18 defense at trial, Mr. Bartenwerfer stated that the Notice of  
19 Violation was "an administrative issue" and that he did not  
20 think he had to disclose it. The Court finds that by the end  
21 of January 2008, Mr. Bartenwerfer was aware that the  
22 undisclosed open permits had expired and still did not disclose  
23 them to Mr. Buckley.

24 On March 13, 2008, the day before escrow closed, Mr.  
25 Buckley's realtor, Josh Nasvik, sent an email to Mr. Monti  
26 itemizing the remaining repairs to be completed. At trial, Mr.  
27 Bartenwerfer testified that he understood that the items on the  
28 list were all that needed to be resolved and that the list did

1 not mention permits. When asked if he was aware at that time  
2 that the electrical permit had not been closed out, Mr.  
3 Bartenwerfer testified he was not sure what he thought at that  
4 time because "there was confusion" around the electrical sign  
5 off; i.e., one of the job cards showed the final electrical  
6 inspection was completed on January 30, 2008.

7 The Court does not find Mr. Bartenwerfer's testimony  
8 credible because, on February 19, 2008, Mr. Buckley sent an  
9 email to Henry Karnilowicz of Occidental Express, a company  
10 helping Mr. Bartenwerfer through the permitting process,  
11 stating "we failed yet another electrical inspection."  
12 Plaintiff's Ex. 16. Accordingly, the Court finds that and  
13 finds that on March 13, 2008, Mr. Bartenwerfer was aware that  
14 the electrical permit had not been closed out. Mr.  
15 Bartenwerfer testified that he did not think he informed Mr.  
16 Nasvik or Mr. Monti of the failed inspection prior to the close  
17 of escrow. Mr. Bartenwerfer also admitted that he did not  
18 request a modification of the Disclosures to reflect the failed  
19 inspection, though he considered it to be material.

20 Considering the totality of the circumstances, including  
21 those surrounding the other material non-disclosures, the Court  
22 finds that the Bartenwerfers omitted information about the  
23 status of permits up through the time of the close of escrow  
24 with the intent to deceive Plaintiff. The Disclosures would  
25 lead a reasonable person to believe that the only outstanding  
26 permit issues related to the kitchen, when in fact there were  
27 10 outstanding permits that had continuing issues through to  
28 the time of close of escrow in March 2008 and beyond, including

1 their expiration in January 2008. Though they received the  
2 Notice of Violation and failed inspections, the Bartenwerfers  
3 failed to notify Mr. Buckley of these issues despite their duty  
4 to do so until sometime after close of escrow. Accordingly,  
5 the Court finds and concludes that the Bartenwerfers had the  
6 requisite knowledge and intent to deceive Mr. Buckley with  
7 respect to non-disclosure of the status of permits.

8 4. Windows

9 The Bartenwerfers answered "No" to the question on the  
10 Disclosure Statement as to whether they were aware of "any  
11 significant defects/malfunctions" in windows. Plaintiff's Ex.  
12 2 at 3. They also did not disclose any problems with windows  
13 in the Supplemental Disclosure.

14 At the state court trial, Mike Barbic, a service  
15 technician for Pella Windows, testified that on February 7,  
16 2008, he made a site visit to the Property and noted that  
17 several windows had been installed "out of square;" i.e., they  
18 were set crooked in the frames and did not function properly.  
19 Joint Designation of Trial Transcript Testimony - Mike Barbic  
20 at 14, 16-18. Mr. Barbic testified that he advised the  
21 Bartenwerfers of the problem and that it was an installation  
22 error. Id. at 22-23. He recalled telling the Bartenwerfers  
23 the following details:

24 In specific there was a window in front of the house  
25 that I believe there was some kind of a railing or  
26 something in the way. The window wouldn't open all the  
27 way, but it would not close all the way. And there is  
28 no adjustments we could to help even - you know, the  
frame was out of square. Typically what we would do is  
we can adjust the hinges to allow the window to close,  
but in this case the railings were in the way. And I  
said there was no way we could fix the window or adjust

1 the window in the condition that it was because I was  
not able to open it up to adjust it.

2 Id. at 24-25. Mr. Barbic also told the Bartenwerfers that a  
3 window in the master bedroom had been installed out of square.  
4 Id. at 29. In addition, Mr. Barbic found that the windows were  
5 sticking between the weather stripping and the paint on the  
6 sash. Id. at 31. Mr. Barbic advised the Bartenwerfers to use  
7 paraffin wax to stop the sticking. Id. Mr. Barbic testified  
8 that the application of wax would not address the out of square  
9 issues. Id. at 32.

10 At trial in this proceeding, Mr. Bartenwerfer stated that  
11 he did not recall whether someone from Pella Windows had told  
12 him that the windows were out of square and needed to be  
13 reinstalled. He recalled being told that an installed door was  
14 out of square, and that his brother, Dale Bartenwerfer - who is  
15 not a contractor, has no expertise in California building  
16 codes, and has no education or training in building codes -  
17 told him all that of the window were working properly. Mr.  
18 Bartenwerfer testified during his state court trial proceeding  
19 that he did not disclose the problem with the door to Mr.  
20 Buckley because his contractor, Sergio Sepeda, told him that it  
21 was impossible for the doors to have been installed improperly  
22 and that therefore, Mr. Bartenwerfer believed the problem to be  
23 a manufacturing defect. Reporter's Transcript of Trial  
24 Proceedings David Bartenwerfer's Testimony, September 6, 2012  
25 at 13. At trial in this proceeding, Mr. Bartenwerfer testified  
26 that he surmised that the problem with the windows was a  
27 manufacturing defect but does not know for sure. Mr.

1 Bartenwerfer testified that he did not recall disclosing the  
2 suspected manufacturing defect to Mr. Buckley or to Mr. Monti.

3 The Court does not find Mr. Bartenwerfer's testimony that  
4 he was unaware that the windows had been installed out of  
5 square credible, because: (a) he had a conversation with his  
6 brother about whether the windows were working properly; (b)  
7 he testified at trial that he believed the window problem to be  
8 a manufacturing defect; and (c) Mr. Barbic's testimony as to  
9 what he told the Bartenwerfers about the windows being out of  
10 square is so detailed and specific and therefore, reliable and  
11 credible.

12 Regardless, even if they believed the window and door  
13 problems to be manufacturing defects rather than installation  
14 problems, the Bartenwerfers should have disclosed these defects  
15 to Mr. Buckley. Pella Windows was asked to come out to the  
16 Property as early as January 2, 2008, long before Mr. Buckley  
17 delivered his list of repairs to be made. This strongly  
18 suggests that the Bartenwerfers were aware of door and window  
19 problems before Mr. Buckley discovered them. Accordingly,  
20 based on the foregoing and the facts and circumstances  
21 surrounding the other non-disclosures, the Court finds and  
22 concludes that the Bartenwerfers had the requisite knowledge  
23 and intent to deceive Mr. Buckley with respect to non-  
24 disclosure of the window problems.

25 5. Fire Escape

26 The Disclosures contained no information about a fire  
27 escape. On October 26, 2008, Mr. Bartenwerfer received an  
28

1 email from Mr. Karnilowicz. Mr. Karnilowicz stated in the  
2 email,

3 I am somewhat concerned about you giving [the buyer]  
4 all the plans, which you will have to do, and I hope  
5 that he doesn't notice the missing fire escape. I  
6 think you ought to wait till the CFC is issued before  
7 you hand over the plans or permits.

8 Plaintiff's Ex. 17. On the same day, Mr. Bartenwerfer received  
9 an email from Mr. Buckley which stated,

10 For some reason the plans and permits you gave my real  
11 estate agent originally do not match or even come close  
12 to what you had with the inspector present Friday, ie  
13 you had given us 2 stamped pages of drawings while you  
14 had in your possession it seemed like 70-80 pages, you  
15 had given us one permit and you had 15 permits taken  
16 out. I will need a copy of all those plans and the 15  
17 permits as soon as possible.

18 Plaintiff's Ex. 22.

19 At trial, Mr. Bartenwerfer testified that Mr. Karnilowicz  
20 advised him that he should not provide the plans to Mr. Buckley  
21 because, if he did so, he would not be able to get a final sign  
22 off on all the building permits. Mr. Bartenwerfer testified  
23 that a previous iteration of the plans included a fire escape  
24 but the final version did not. He testified that he relied on  
25 the approved plans, that the plans did not include a fire  
26 escape, that no fire escape was required because it was a two-  
27 story house, and that he had not intended to install one.

28 Contrary to Mr. Bartenwerfer's testimony at trial  
suggesting that he had no duty to disclose the missing fire  
escape because it wasn't included in the final plans, the jury  
in the state court found the omission of the lack of a fire  
escape was material and caused harm to Mr. Buckley.

1       Accordingly, based on the email exchange between Mr.  
2 Bartenwerfer and Mr. Karnilowicz, the fact that Mr.  
3 Bartenwerfer did not initially provide Mr. Buckley with a  
4 complete set of drawings and permits, and the facts and  
5 circumstances surrounding the other non-disclosures, the Court  
6 finds and concludes that the Bartenwerfers possessed the  
7 requisite knowledge and intent to deceive Mr. Buckley with  
8 respect to non-disclosure of the missing fire escape.

9           **V.       CONCLUSION**

10       Based upon the above findings of fact and conclusions of  
11 law, the Court finds that Mr. Buckley has satisfied his burden of  
12 establishing by a preponderance of the evidence that the  
13 Bartenwerfers's debt to Mr. Buckley with respect to the non-  
14 disclosure of water leaks, window conditions, permits, and the  
15 fire escape is nondischargeable under section 523(a)(2)(A).  
16 Accordingly, the Court will enter judgment in favor of Mr.  
17 Buckley consistent with this memorandum decision.

18                   **\*\*END OF ORDER\*\***

Court Service List

[None]